STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO CRAIG, by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellant,

v

MARK I. SILVERMAN, M.D., J.D., P.C., and MARK I. SILVERMAN,

Defendants-Appellees.

UNPUBLISHED
April 20, 2006

No. 265155
Wayne Circuit Court
LC No. 05-502746-NM

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff, by his next friend and guardian Kimberly Craig, appeals as of right from the circuit court's order granting summary disposition to defendant Mark Silverman and the business entity through which he practices. We affirm.

Plaintiff filed this legal malpractice action against defendants after our Supreme Court reversed a $21 million judgment that defendant Silverman[1] secured for plaintiff following a jury trial in an underlying medical malpractice action. Our Supreme Court's decision in *Craig v Oakwood Hosp*, 471 Mich 67, 70-71; 684 NW2d 296 (2004), contains the following background facts of the medical malpractice action:

> Plaintiff, now an adult, suffers from cerebral palsy, mental retardation, and a number of other neurological and physical ailments. He argues, through his mother as next friend, that these conditions are the proximate results of . . . negligence in treating his mother during her labor leading to his delivery. Specifically, plaintiff maintains that [the] defendants administered an excessive amount of a contraction-inducing medication to his mother and were unable to detect signs of fetal distress because they failed to make appropriate use of fetal monitoring devices. . . .

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[1] Because of the identity between defendant's person and business, the singular "defendant" will be used in this opinion without differentiation.

> Following a five week trial, the jury returned a verdict in plaintiff's favor. . . . The trial court denied the defendants' motions for judgment notwithstanding the verdict or for a new trial.

The trial court in that case denied a motion for judgment notwithstanding the verdict (JNOV), and ultimately entered a judgment of $21 million. *Id.* at 75-76. This Court affirmed the judgment of liability, but ordered remittitur on the award covering lost wage-earning capacity. *Craig v Oakwood Hosp*, 249 Mich App 534, 544; 643 NW2d 580 (2002).

The Supreme Court reversed this Court's decision. At the underlying trial, plaintiff's expert, Dr. Ronald Gabriel, offered the novel theory that "Pitocin administered to Ms. Craig produced contractions of excessive duration and force, that these contractions caused plaintiff's head to be repeatedly ground against Ms. Craig's pelvic anatomy, and that the resulting head trauma caused plaintiff's cerebral palsy." *Craig*, *supra*, 471 Mich at 83. The Supreme Court questioned the propriety of introduction of this theory, *id.* at 83-84, but determined that even if Dr. Gabriel's testimony had been properly admitted, JNOV was nonetheless proper because of "plaintiff's failure to establish that [the medical providers'] breach of the applicable standard of care proximately caused his cerebral palsy," *id.* at 85. The Court accordingly reversed and remanded for entry of JNOV. *Id.*

Plaintiff subsequently commenced this legal malpractice action on January 31, 2005. The trial court found the original pleading insufficient, and ordered a more definite statement. A first amended complaint followed, which alleged that defendant failed to elicit sufficient testimony concerning causation in the underlying case, and that defendant failed properly to advise Ms. Craig concerning settlement offers. Defendant responded with motions for summary disposition and involuntary dismissal. The trial court granted all the motions, disallowed any further amendment of the pleadings, and dismissed the case. This appeal followed.

I. Summary Disposition

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In reviewing a trial court's decision on a (C)(8) motion, this Court accepts as true all factual allegations in the complaint and reasonable inferences that may be drawn from them. *Id.*

Plaintiff argues that the trial court erred by demanding a greater degree of pleading particularity than is required by the law. We disagree. A complaint must include "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). A plaintiff claiming legal malpractice must adequately allege the existence of an attorney-client relationship, negligence in the representation, proximate causation of injury, and the fact and extent of the injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). At issue here is whether plaintiff adequately pleaded deficiencies in defendant's performance as a malpractice attorney, concerning the evidence of causation presented at the underlying trial, and his handling of settlement offers.

Where a malpractice claim in premised on how the attorney conducted a civil trial, "[i]n order to establish proximate cause, a plaintiff must show that . . . but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). If, as in this case, success at trial and in the first appeal does not itself necessarily indicate competent lawyering, we nonetheless regard such a record as militating against the conclusion that malpractice occurred. If plaintiff can in fact set forth no actionable theory of causation, then defendant's success despite that lack, before the Supreme Court exposed the error, shows defendant to have performed very well indeed.

Malpractice actions do not necessarily require greater specificity in pleading than other actions. But "the degree of specificity required flows from the circumstances of the case and from the nature of the action itself." *Martinez v Redford Community Hosp*, 148 Mich App 221, 229-230; 384 NW2d 134 (1986). Accordingly, where "the facts which form the basis of the action are outside the common knowledge of the ordinary layperson, a greater degree of specificity in the complaint will be required so as to lead the court to only one inference." *Id.* at 230. The element of causation in the underlying medical malpractice trial was a matter of some complexity, as is illustrated by this Court's having thought the evidence in that regard sufficient only to see the Supreme Court conclude otherwise.

Upon finding the original complaint lacking the required specificity, the trial court instructed plaintiff set forth specific facts showing what expert testimony on causation should have been elicited from plaintiff's expert, and also facts concerning how any omission on defendant's part caused plaintiff ultimately to lose on appeal.

The first amended complaint included the allegation that defendant "should have elicited testimony from Dr. Gabriel which would have identified a specific part of Ms. Craig's anatomy, which collided with the fetus' head during labor," and that defendant "failed to have Dr. Gabriel establish through the use of appropriate scientific literature and/or knowledge this entire issue of causation." But the complaint fails to specify the anatomy involved with the expert's novel theory, leaving defendant to guess at the factual basis for the theory of causation. This failure in turn renders the existence of any medical literature or other authority that might support the theory speculative. To survive a (C)(8) motion in this instance, plaintiff should have detailed the factual basis for his causation theory, and at least cited informational resources, organizations, or authorities that have produced medical literature in support of it.

Plaintiff's failure to articulate a specific theory of causation, in two attempts, underscores our Supreme Court's wisdom in finding proof of causation lacking in the first instance. Plaintiff had no specific such theory, beyond speculation, to offer at trial, and to this day cannot set forth any such, scientifically sound, particular theory. It was not malpractice for defendant to fail to offer what did not exist.

Concerning plaintiff's allegation that defendant mishandled settlement negotiations that occurred while the underlying case was pending on appeal, the trial court asked plaintiff to set forth the specific settlement offers involved, plus specific facts concerning how defendant's acts or omissions left Ms. Craig unable to evaluate or respond to them.

However, the amended complaint suggests not that defendant entirely failed to communicate settlement offers to Ms. Craig, but that he improperly caused her to reject them.

The claim further asserts that defendant characterized the settlement offers as inadequate, that defendant offered Ms. Craig psychiatric medications, and that an inappropriately intimate personal relationship developed between Ms. Craig and defendant.

Despite some implications of some developments of questionable ethical propriety, however, the allegations include no assertion of any specific coercive tactic, and no assertion that Ms. Craig would in fact have accepted any settlement actually offered. In the continued absence of any such particulars, the trial court properly held that the amended pleading failed to state a claim in connection with defendant's handling of settlement matters.

II. Amendment of the Pleadings

A trial court's decision whether to allow amendment of the pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). MCR 2.116(C)(5) provides that where a trial court finds merit in a (C)(8) motion, it "shall give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows that amendment would not be justified." In this case, the trial court was persuaded not to allow further amendment, on the grounds that, in the underlying trial, Dr. Gabriel indicated that he could offer no better detailed theory of causation, and that Ms. Craig made plain that she would not accept a settlement offer below an amount that no offer ever reached. We agree with the trial court.

Dr. Gabriel was asked at the underlying trial about authorities supporting his theories concerning the effects of Pitocin on fetal brain development, and the degree of certainty with which he believed that brain damage resulted from administration of Pitocin in this instance. He was also asked whether he had published his ideas about "fetal trauma in hitting the roof of the pelvis during labor and delivery." But Dr. Gabriel admitted that he was not competent to answer technical questions concerning obstetrics, provided no clarification when confronted with his inability to "explain the anatomy, . . . how this child's head could get off track out of the cervix and somehow derail . . . into the bone of the pelvis," and had only vague answers when asked to cite medical literature supporting his theory of a "compression type of injury . . . ."

Given that these questions were asked at the underlying trial, and that the Supreme Court was not satisfied from the answers that Dr. Gabriel had adequately set forth an actionable theory of causation, it is apparent that defendant would have had nothing to gain from belaboring such lines of inquiry.

The evidence thus indicates that the parties simply had no actionable theory of causation available to them at the underlying trial. Because no better performance on defendant's part, or reworking of the instant pleadings, would have supplied that lack, dismissal of that claim without further amendment was appropriate in this instance.

Concerning the settlement negotiations, plaintiff neither disclaims letters attributed to Ms. Craig rejecting settlement offers to date and demanding nothing less than $7.6 million, nor

asserts that she would in fact have accepted any settlement actually offered. Nor does plaintiff specify what facts additional discovery might have turned up that would have allowed for more detailed pleading. For these reasons, the trial court did not abuse its discretion in disallowing further amendment.[2]

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter

[2] Plaintiff complains that the trial court looked beyond the pleadings in the course of deciding the (C)(8) motions, but the transcript clearly shows that the court did not concern itself with the evidence before it until it had ruled on the (C)(8) motions and began to address the question of amendment.